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Two well-settled rules of express conditions are, —

Express conditions must be performed, not alone in spirit, but in letter.

But prevention by the defendant of performance of the condition will excuse non-performance.

A descending scale of prevention of performance of this particular condition might be thus written: (1) prevention directly by the defendant, or indirectly by his collusion with the architect; (3) prevention by fraud on the part of the architect; and (3) prevention by the unwillingness or unreasonableness of the architect. But of these three, only (1) has the quality of prevention laid in the above rule; namely, prevention by the defendant. Authority and principle agree that (1) excuses non-performance; but on (2) and (3) they part company, (2) being the more conservative rule adopted in this country, *Chinn* v. *Schipper*, 51 N. J. Law, 1, and (3) the more general rule, *Nolan et al.* v. *Whitney*, 88 N. Y. 648; *Bentley* v. *Davidson*, 43 N. W. Rep. 139.

Often the proposition is confounded with the rule of implied conditions, that after part performance the breach must go to the essence. So in builders' contracts the question is put, as in the principal case: Has there been substantial compliance? But when this is done, the real nature of an express condition is lost sight of. An express condition is one mutually agreed by the parties to be binding; and when there is a contract already expressly made by the parties, the court must not find another in its stead.

After all is said, the facts remain that the condition is a very common one and a very hard one. Either the condition had to be changed by the builders, or its interpretation by the courts. And the change has been made by the courts rather than by the building fraternity.

THE LIABILITY OF MUNICIPAL CORPORATIONS AS CONSTRUCTIVE TRUSTEES. — The opinion of the Supreme Court of Pennsylvania in the Franklin Will Case (*In re Franklin's Estate*, 24 Atl. Rep. 626) is in more ways than one a disappointment. The subject is surely of importance to justify an opinion of average clearness and care; but the court succeeds in keeping two possible grounds for its decision vaguely shadowed forth so impartially that it is impossible to pick out either point as absolutely decided. To add to the flimsiness of their opinion, they refrain from quoting authorities on either point.

Benjamin Franklin left £1000 to the city of Philadelphia, to hold in trust, to lend at interest for one hundred years, at the end of which time part was to be appropriated to municipal objects, and the rest accumulated another century, to be divided finally between the city of Philadelphia and the State of Pennsylvania. The present appellant from the Orphans' Court, where the petition for an account was brought, claim that the trusts are void, and that they are entitled as representatives of the next of kin and the claimants under Franklin's residuary legatees.

The court grants for the present purpose that the trust for accumulation was illegal, and the bequest for that reason void. "It does not, however," they say, "necessarily follow that the fund was impressed, in the hands of the city, with a trust in favor of the residuary legatees or the legal representatives of the testator, or that the city, in virtue of its acceptance of it, became a trustee for the appellants, and, as such, liable

to account to them in the Orphans' Court." The last part of this sentence suggests the possibility that the court only wishes to say that the Orphans' Court has jurisdiction of express trusts only, and that therefore this case belongs to the Court of Common Pleas. If so, their expressions are most unfortunate; and it really seems impossible to escape the belief that they intend to say that a municipal corporation is not liable as constructive trustee when an express trust fails, so that an individual would be liable. A corporation, they say, being the creature of law, "can have only those capacities which are imparted, and exercise only those powers which are expressly, or by necessary implication granted to it. . . . In the absence, therefore, of an express grant of power to accept and hold property upon purely private trusts, and to execute such trusts, it can no more do so than can a nonentity." This last point is the only one on which they quote authorities, — one a dictum from Judge Sherwood, who is speaking of express trusts, and says that a municipal corporation cannot administer them for purely private purposes; the other, *Mayor* v. *Elliott*, 3 Rawle, 170, where nothing is said on the subject, and the decision is that certain trusts were good, as among the objects for which the corporation existed.

After supporting a point not in issue by this brilliant array of authorities, the court quickly assumes that a city can be constructive trustee in no case where it could not be express trustee. "Where a trust is implied contrary to intention, as would be the case here, the implication is a fiction of the law inserted to prevent a failure of justice. But the law will not resort to a fiction that will defeat its own policy by converting into a trustee a municipal corporation from which it has, for the public good, withheld capacity to accept and administer the trust."

Why this reasoning would not apply to an individual trustee, they do not state. It would be superfluous to quote authorities to show that the decision is as bad law as it is bad sense. Several cases are collected in *Chapman* v. *Co. of Douglas*, 107 U. S. 348. A good statement of the law is this from Chief Justice Field, in *Pimentel* v. *City of San Francisco*, 21 Cal. 362: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake or without authority of law, it is her duty to refund it, from the general obligation. If she obtains other property which does not belong to her, it is her duty to restore it, or if used, to render an equivalent therefor, from the like obligation. The legal liability springs from the moral duty to make restitution."

WAGERING CONTRACT: A QUESTION OF DEFINITION. — In *Carlill* v. *Carbolic Smoke Ball Co.* (1892), 2 Q. B. 484, Hawkins, J., gives us a definition of wagering contract. In view of the prominence or contracts in "futures," and the unsatisfactory grounds of their decisions, some analysis of this definition may be of service. The question was raised on curious facts. The Smoke Ball Co., by public notice, offered £100 to whomsoever contracted the increasing epidemic influenza colds after using their carbolic smoke ball daily for two weeks. The plaintiff did so use the smoke ball, and contracted the cold; and the defendant now contends that it is a wagering contract, as the liability depended on events beyond control of the parties.